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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

STATE OF OKLAHOMA and
STATE OF TEXAS,

Plaintiffs,

v.

STATE OF NEW MEXICO,

Defendant.

REPLY OF THE STATE OF TEXAS TO EXCEPTIONS OF NEW MEXICO AND BRIEF IN SUPPORT OF REPLY

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January 22, 1991

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TEXAS' REPLY TO EXCEPTIONS OF NEW MEXICO

Texas replies to the Exceptions to the Special Master's Report filed by New Mexico on December 20, 1990. Although New Mexico's pleading is titled "Exceptions to the Special Master's Report," no exceptions are actually designated therein. The pleading states that New Mexico excepts to Chapter VII and the Recommended Decree of the Special Master's Report. NM Exceptions at 1. Therefore, in this Reply and in the supporting brief which follows, Texas will consider argument headings I through III in New Mexico's pleading as exceptions and argument heading IV as comments.

In the supporting brief which follows, the Special Master's 1990 Report will be referred to as the Report.

New Mexico's Exceptions are without merit and should be denied.

Respectfully submitted,

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TEXAS' BRIEF IN SUPPORT OF REPLY

QUESTIONS PRESENTED

1. Whether the Report correctly interprets the language of Article IV of the Canadian River Compact which sets out New Mexico's Compact allocation.

2. Whether the record in this case establishes that New Mexico has breached the Canadian River Compact.

3. Whether Paragraphs 1, 4, and 9 of the Recommended Decree require modification.

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STATEMENT OF THE CASE

The Report accurately summarizes this controversy and correctly recounts the procedural history of the case and the background of the dispute. Report at 1-22. New Mexico adopts the Report's "facts and proceedings" stated on those pages "except as corrected in this brief." NM Exceptions at 1. In this supporting brief, Texas will address New Mexico's objections to statements made on pages 1-22 of the Report to the extent that such objections are discernible under New Mexico's individual arguments.

ARGUMENT

I.

The Special Master Correctly Determined That the Article IV(b) Limitation Applies to All Waters Below Conchas Dam in New Mexico, Other Than Diversions from Conchas Reservoir for Use on the Tucumcari Project

A. New Mexico's "direct reading" argument is inconsistent.

The record establishes that the interpretation of Article IV contained in the Report is the interpretation intended by the Compact negotiators and Congress. New Mexico's Exceptions challenging this interpretation are predicated on its argument that, under a "direct reading," the "originating" language in Article IV(a) and Article IV(b) is susceptible to only one meaning. *See, e.g.*, NM Exceptions at 3, 17 and 20. However, New Mexico's interpretation of the "originating" language in Article IV(a) is directly contrary to its interpretation of the same language in Article IV(b).

Under New Mexico's argument, the "direct reading" of the "originating" language in Article IV(a) is that it

includes waters entering the Canadian River basin in New Mexico from upstream tributaries in Colorado. In contrast, New Mexico argues that the "direct reading" of the same "originating" language in Article IV(b) *excludes* waters that have entered the basin below Conchas Dam from upstream of the dam.

New Mexico says that "the only reasonable reading of the Compact" is that Article IV(a) gives New Mexico free use of "waters originating *in that state* above Conchas Dam." NM Exceptions at 20. If this were correct, New Mexico could not use Canadian River waters that flow into the state from tributaries in Colorado because that water does not literally "originate" in New Mexico. To avoid this result, New Mexico's argument necessarily assumes that the water changes character as it crosses the Colorado - New Mexico state line and "originates" in New Mexico under Article IV and is therefore available for New Mexico's use. On the other hand, New Mexico argues that waters crossing Conchas Dam into the lower basin do not change character, but remain allocated to New Mexico without limit as "above Conchas" water under Article IV(a). However, New Mexico further argues that once water crosses the New Mexico - Texas state line, it again changes character and is no longer water "originating" in New Mexico and therefore not subject to allocation under Article IV. NM Exceptions at 20-21. These inconsistent propositions are what New Mexico tries to present as a direct reading of the Compact.

New Mexico relies on Article V of the Compact for its interpretation that the "originating" language in Article IV(a) and IV(b) excludes waters that have crossed the state line from New Mexico into Texas regardless of point of origin. New Mexico bases this interpretation on the fact that Article V makes a separate allocation of those waters to Texas after they cross the New Mexico - Texas state line. NM Exceptions at 20-21. In exactly the same manner, New Mexico's allocation of waters above Conchas Dam under

Article IV(a) necessarily ends when the waters cross Conchas Dam because Article IV(b) makes a separate and restricted allocation of the waters below Conchas Dam.

New Mexico's complaint that the Special Master "deleted" the "originating" language from Article IV, thereby supposedly rewriting the Compact, is based solely upon its disagreement with his interpretation of that language. Under the Special Master's interpretation, as water enters the lower basin via spills, releases, or other means, it "originates" in the lower basin and is therefore subject to the Article IV(b) limitation. This interpretation, unlike New Mexico's, can be applied consistently to Canadian River waters in Colorado, in the upper and lower basin in New Mexico, and in Texas.

B. The Special Master's interpretation of Article IV reflects the intent of the Compact negotiators and Congress.

The interpretation of the "originating" language in Article IV became the most significant issue in this litigation since under New Mexico's interpretation, the downstream states could no longer expect to receive Canadian River waters from New Mexico. In order to determine the correct meaning of the disputed language, it was necessary to compile and review the Compact's negotiating history and other relevant documents so that the language could be viewed in light of the surrounding circumstances. Report at 53. At the direction of the Special Master, an exhaustive record was compiled containing all relevant materials that could be located by the states. The Report reflects careful and thorough consideration by the Special Master of this record, the Agreed Material Facts, and the briefs and arguments of the parties.

The Special Master appropriately considered the intent of the Compact negotiators, as reflected in the negotiating history and other relevant documents, and

interpreted the terms of Article IV in a manner to effectuate that intent. He found that the words "waters originating" in the phrase "free and unrestricted use of all waters originating in the drainage basin of Canadian River *above* Conchas Dam" in Article IV(a) were intended to mean waters which are stored, used, or diverted for use at or above Conchas Dam. Report at 58-59 (emphasis added). He likewise found that the words "waters originating" in the phrase "free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico *below* Conchas Dam" in Article IV(b) were intended to include all waters reaching the mainstream of the Canadian River below Conchas Dam. Report at 59 (emphasis added).

New Mexico agrees that it was proper for the Special Master to consider extrinsic evidence, but claims that he could only use such evidence to interpret the Compact in accordance with New Mexico's theory. (NM's Exceptions at 2, 7-8). The extrinsic evidence indicates, however, that New Mexico's interpretation is the opposite of that intended by the Compact negotiators. The goals of the negotiators for their respective states are clearly established in the record. New Mexico was interested in protecting its developments above Conchas Dam, including the Tucumcari Project, and in providing for reasonable development on tributaries below Conchas Dam, primarily on Ute and Pajarito Creeks where there was potential irrigable acreage. Report at 60, 64-65. Texas was interested in restricting New Mexico's future storage of water in order to permit adequate flows into Texas for the Sanford Project. Report at 60. Oklahoma sought the opportunity for future development of the Canadian River for municipal uses. *Id.*

The Senate report on the Compact consent legislation recognized that the interests of the three states were all served by the negotiated Compact and that it would permit the orderly development of the basin's water resources. NM Ex. 29 at 2. New Mexico received protection for existing

and authorized uses above Conchas Dam[1], including the Tucumcari Project. Report at 64. It also received an additional 200,000 acre-feet storage allocation for projects below Conchas Dam, which the negotiators agreed was sufficient to regulate the tributaries below the dam. Report at 65. The New Mexico negotiator declared that "storage capacity for all projects which may be feasible below Conchas will probably not equal the 200,000 acre foot storage limit." P. Ex. 30 at 1.

New Mexico erroneously asserts, without citation, that the Report "admits" that the negotiating history did not address spills. NM Exceptions at 28. The Report correctly determined that New Mexico negotiated for a right to develop 200,000 acre-feet of the tributary flows below Conchas Dam and that the states intended for the spills from Conchas Dam to pass to Texas. Report at 64-66. As noted in the Report, the Hill Memorandum summarizing the Compact stated that New Mexico was entitled to a reasonable amount of storage below Conchas Dam to impound the flood flows of the tributaries of the Canadian River. Report at 65. The impoundments were thus expected to be placed on the tributaries and the unrestricted mainstream would transport spills from Conchas Dam to the downstream states.

New Mexico's assertion that the Engineer Advisors did not address spills is also erroneous. NM Exceptions at 28. In formulating and evaluating criteria for Compact allocations, the Engineer Advisors included spills from Conchas Dam in their estimates of inflows into the Sanford Project (Lake Meredith) in Texas. Report at 65; *See also,* Agreed Material Fact D.16.

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[1]Texas and Oklahoma agreed that storage limitations were not necessary above Conchas Dam because the waters there had been fully developed. Report at 64. The negotiators believed, therefore, that all future water development in New Mexico would necessarily be below Conchas Dam and subject to the Article IV(b) limitation.

Representatives of the U.S. Bureau of Reclamation (Bureau) attended the meetings of the Compact Commission and participated in the meetings of the Engineer Advisors. Report at 82. The Bureau's water supply studies for the Sanford Project included outflows from Conchas Dam, as well as tributary flows downstream as sources of water for that project. Agreed Material Fact C.7. The Bureau's studies assumed that New Mexico would impound a maximum of 200,000 acre-feet of water below Conchas Dam. Report at 83-84. Waters below the dam in excess of that amount, including spills from Conchas Dam, would be available for the Sanford Project. If the negotiators had intended to reserve all outflows from Conchas Dam to New Mexico, the Bureau could not have included them in determining water available for the project.

New Mexico objects to any reliance by the Report on Bureau studies because Conchas spills were not used in the Bureau's safe annual yield calculations that were a basis for financing the project. NM Exception 24, 31. However, the safe annual yield was determined by critical drawdown estimates under drought conditions when no spills occurred. P. Ex. 102 at 62-63. However, New Mexico's objection does not detract from the significance of the Bureau's interpretation of the Compact. As stated above, the Bureau was intimately involved in the studies used to allocate waters under the Compact. It understood that outflows from Conchas Dam were available to Texas under Article V of the Compact, not reserved to New Mexico, and the Bureau relied on spills that exceeded the 200,000 acre-foot limitation below Conchas Dam flowing to the Sanford Project, in whatever year they occurred.

In addition to the material cited in the Report, other documents in the record show that spills from Conchas Dam were not reserved to New Mexico. For example, Texas' understanding of its Compact allocation was articulated by Texas Engineer Advisor Charles Stevens, who participated in the Engineer Advisors' studies and attended the

Compact Commission negotiation meetings. P. Ex. 96A at 1; 96B at 1; 96C at 1. Mr. Stevens reported to his superiors at the Texas Board of Water Engineers as to the effect of the Compact just five weeks after it was signed. P. Ex. 36 at 1. His report included a summary of the hydrologic studies made by the Engineer Advisors, including the scenarios showing spills from Conchas Dam flowing into Texas for use in that state. *Id.* at 1-3, Appendix A. Mr. Stevens concluded in his report:

> Thus, in my opinion, the net effect of the compact is to allow New Mexico to develop its water resources, as it sees fit, up to an aggregate of 200,000 acre-feet of conservation storage which restriction permits the State of Texas to plan and develop its portion of the South Canadian with full knowledge of the limitations placed on upstream development in New Mexico.

Id. at 3. Texas could not have had full knowledge of the limits of New Mexico's upstream development for planning and developing the Sanford Project or any other project on the Canadian River unless the Special Master's interpretation is correct.

To refute all of this support for the Special Master's interpretation, New Mexico relies upon a parenthetical phrase - "(not including spills)" - in a letter from New Mexico Compact Commissioner John Bliss to New Mexico Senator Clinton Anderson, transmitting copies of the Compact. NM Exceptions at 13-14, 33-34. The relevant portion of this letter is as follows:

> Under [the Compact] New Mexico has free and unrestricted use to all water above and below Conchas Dam, the only restriction being that the total storage capacity for conservation purposes of the waters rising below the dam

> (not including spills) shall not exceed 200,000 acre feet. There are no obligations or restrictions whatsoever on the use of the waters so stored below Conchas Reservoir. Since preliminary studies indicate that less than this amount will probably be required for all feasible projects below Conchas, including Ute and Pajarito Creeks, I believe that New Mexico rights and potentialities are fully protected.

P. Ex. 28. New Mexico argues, without elaboration, that the phrase - "(not including spills)" - is conclusive evidence that the New Mexico negotiator believed that the Compact allowed New Mexico to impound all Conchas spills without limitation. NM Exceptions at 13-14; 33-34.

The meaning of this phrase is not clear. It must be viewed in context with the language in the letter stating that less than 200,000 acre-feet will probably be required for *all feasible projects* below Conchas Dam. This understanding was also expressed in another letter written that day transmitting copies of the Compact to New Mexico Governor Mabry.[2] In his letter to Governor Mabry, Mr. Bliss described the Compact as follows:

> The only limit imposed by the Compact is that total storage of waters originating below Conchas Dam, for conservation purposes, shall not exceed 200,000 acre feet. I consulted with the Bureau of Reclamation and checked the records available in this office and find that storage capacity for all projects which may be feasible below Conchas will probably not equal the 200,000 acre foot storage limit. I feel,

[2]Contrary to New Mexico's assertion, the Report does not refer to these letters as written in the same *week* but correctly refers to them as dated the same *day*. Report at 75.

> therefore, that the Compact, in effect, imposes little or no restriction on any irrigation development in the state.

P. Ex. 30 at 1. Not only does this letter not mention spills, but Mr. Bliss characterizes New Mexico's limitation as a 200,000 acre-foot storage limitation *for all projects* below Conchas Dam. It is not plausible that he would have neglected to mention storage rights beyond the 200,000 acre-foot limit in his letter transmitting the Compact to the Governor for submission to the state legislature. Report at 76. The only explanation is the one expressed in his letter, i.e. that he believed that the Compact limited all storage below Conchas Dam to 200,000 acre-feet.

These transmittal letters conclusively show that Mr. Bliss believed that New Mexico had bargained for and obtained sufficient storage for "*all* projects" that might be feasible below Conchas Dam. At that time, the only feasible reservoir projects that had been identified below Conchas Dam were on tributaries. P. Ex. 41 at 4-14, 4-15. (1953 New Mexico study on feasible projects in Canadian River basin.) The Bliss letters reflect that New Mexico's goal of protecting its potential to develop tributary waters below Conchas Dam to irrigate additional lands was fully realized by the Compact's 200,000 acre-foot allotment.

Mr. Bliss and the other Compact Commissioners adopted the Hill Memorandum as a correct interpretation of the Compact. P. Ex. 96D at 2. The Hill Memorandum states that the Compact recognized New Mexico's entitlement to a reasonable amount of additional storage for the waters of Ute Creek and other tributaries below Conchas Dam, and that 200,000 acre-feet was more than sufficient for that purpose. Report at 65. This again shows Mr. Bliss' understanding that development was planned for the tributaries below Conchas Dam. that spills would not be included in that development, and that the 200,000 acre-foot limit was more than sufficient for that purpose.

The Hill Memorandum further stated that Texas and Oklahoma recognized that full development had already been made of all waters of the Canadian River originating above Conchas Dam and that therefore there was no reason to place a limitation upon the storage of such waters. P. Ex. 38 at 3. The building of additional reservoir capacity downstream of Conchas Dam to impound waters "originating" above Conchas Dam would certainly be further development of those waters and, therefore, would be contrary to the understanding of the Compact negotiators.

All other expressions of Mr. Bliss in the record on this subject show his understanding that the Compact allowed New Mexico to construct no more than 200,000 acre-feet of storage below Conchas Dam. In October 1951, in response to an inquiry by the Bureau regarding "potential uses of water by New Mexico below Conchas Dam," Mr. Bliss replied that it would be "improper for me to make any estimates which might limit or exclude future projects permitted under the Canadian River Compact." P. Ex. 39 at 1. Mr. Bliss advised the Bureau that:

> In making a water supply analysis for the Sanford Project in Texas, it seems to me that the only safe assumption that the Bureau can make regarding New Mexico uses is that the *full 200,000 acre feet* of conservation capacity allowed by the Compact will be constructed and the water used at some point below Conchas Dam.

Id. (emphasis added).

Mr. Bliss again described his understanding of the limitation in a letter to the new Governor of New Mexico in February 1952, regarding the pending legislative approval of the Compact:

> The only restriction is that [New Mexico's] construction of new storage reservoirs below Conchas Reservoir will be limited to 200,000 acre feet of conservation capacity which all studies indicate is ample for all feasible projects below Conchas Reservoir.

P. Ex. 40 at 1.

The record therefore conclusively establishes that Mr. Bliss understood that the Compact permitted New Mexico to construct no more than 200,000 acre-feet of conservation storage below Conchas Dam and that such construction was expected to be on tributaries to the Canadian River. Mr. Bliss did not expect that spills would be included in that 200,000 acre-feet but would flow to the downstream states.

When viewed in the context of these other contemporaneous expressions, the parenthetical phrase in Mr. Bliss' letter to Senator Anderson may be understood to mean that Mr. Bliss merely meant that spills were not part of the development protection that New Mexico had sought and obtained under the Compact. Nothing in that letter or in any other document shows that Mr. Bliss understood that all spills from Conchas Dam were exclusively allocated to New Mexico under the Compact.

If, as New Mexico claims, Mr. Bliss intended that all Conchas spills should be reserved to New Mexico, that was never communicated to the other states or to the Governor or Legislature of New Mexico. Report at 75-76. Texas firmly believes that Mr. Bliss did not have any such subjective and duplicitous intent. However, if he did subjectively believe that the Compact allocated all Conchas spills to New Mexico, the Compact must be construed against that interpretation since that belief was not communicated to the other parties to the Compact. Where only one party knows or has reason to know of a conflict in

meaning, a contract will be interpreted in favor of the party who does not know of the conflict. Restatement (Second) of Contracts, Sections 20, 201 (1981); *See also United States v. Haas and Haynie Corp.*, 577 F.2d 568, 573 (9th Cir. 1978).

New Mexico cites a Senate report as showing Congressional intent to give New Mexico exclusive right to all of the Conchas spills. NM Exceptions at 14. This report does not show any such intent but only reflects the language in the Compact. NM Ex. 29 at 2. Moreover, the report recognizes that the rights granted to New Mexico under Article IV(a) of the Compact were separate and distinct from those granted under Article IV(b). This is contrary to New Mexico's arguments that its rights under Article IV(a) carry through and are superimposed on its rights under Article IV(b).

If Congress had intended that New Mexico receive the disproportionate share of the Canadian River waters that it now claims, that intent would have been evident in the Congressional records. Instead, Congress declared that the Compact's purpose was "to provide the basis for effectuating an equitable division of the use of the waters of the Canadian River" basin in the three states. NM Ex. 29 at 1. New Mexico's interpretation, under which it can capture all of the waters in the basin above Conchas Dam, all the waters in the basin below Conchas Dam that entered that basin from above Conchas Dam, in addition to 200,000 acre-feet of "other" waters below the dam, is not an equitable apportionment of the basin waters and is directly contrary to the expressed intent of Congress.

The only other document in the record that New Mexico cites for its interpretation is based upon a 1956 technical report by a lower level staff engineer in the New Mexico State Engineer Office. P. Ex. 114. In the report, the writer opines that the 200,000 acre-foot limit under Article IV(b) "evidently" does not include waters passing through

Conchas Dam. P. Ex. 114 at 1. The writer then erroneously "assume[s]" that waters passing through Conchas Dam could be impounded above the 200,000 acre-foot restriction without violating the Compact. *Id.* Since that part of the technical report was included in the New Mexico State Engineer's Biennial Report for 1954-1956, New Mexico claims that it must have been relied upon by the New Mexico Governor and Legislature when Ute Dam construction was authorized.[3] NM Exceptions at 37. Not only is there no hint in the record of such reliance, the New Mexico State Engineer's Biennial Report for 1956-1958, included reservoir spills in describing waters originating in the drainage basin *below* Conchas Dam. Report at 79.

The record clearly shows that New Mexico's present interpretation was not contemplated by anyone involved with Ute Reservoir until after the Complaint was filed in this lawsuit. *See* Report at 79-81. The controversy arose in 1982 when New Mexico claimed that water to be impounded in an enlarged Ute Reservoir would be exempt as a recreation and sediment control pool. *See* Texas' Exceptions at 5. However, New Mexico's present interpretation was first asserted in pleadings filed after this lawsuit was initiated. Furthermore, it was not until 1989, two years after this lawsuit was initiated, that the New Mexico Interstate Stream Commission (NMISC) amended its permit for Ute Reservoir to reflect the position taken in New Mexico's second affirmative defense. *Id*; Special Master's Ex. 2.

C. *The Report's recommendation would effectuate the equitable division of the Canadian River provided by the Compact.*

New Mexico's attempt to portray itself as a victim of an interpretation of the Compact that would deny it any

[3]The State Engineer issuing the 1954-1956 Biennial Report was not John Bliss, but a new State Engineer who joined the office in 1955 and had not been involved in the Compact negotiations. Deposition of Steve Reynolds, May 16, 1989, at 5-6.

share of the spills over Conchas Dam is incredible. NM Exceptions at 22, 30. New Mexico's complaint is apparently that, if it is maintaining its full 200,000 acre-feet storage allocation below Conchas Dam and Conchas Reservoir is full and spilling, New Mexico will be unable to capture those spills below Conchas Dam. In other words, even when New Mexico was enjoying the total amount that it sought and received under the Compact, New Mexico claims that it would be victimized if it could not lawfully capture excess waters spilling over Conchas Dam before they reach the Texas state line.

The Report's interpretation of Article IV would not deny New Mexico a share of Conchas spills. New Mexico and Texas could capture and use such spills *up to the amount of their respective Compact limits.* As the Report correctly notes, New Mexico's real complaint is that it might have to share some of the spills. Report at 68.

New Mexico's claim of an entitlement to all of the Conchas spills is particularly egregious since only about 1,000 acre-feet of water has been diverted from Ute Reservoir since its construction in 1963. *Id.* In contrast, Texas relies on its equitable share of the Canadian River waters to meet the municipal and industrial water supply needs of the approximately 460,000 people in the Texas High Plains. Report at 9. Any spills from Conchas Dam reaching Texas will be used to satisfy those needs.

New Mexico attempts to justify its far-reaching claims on the grounds that a "de facto" sharing of the spills from Conchas Dam would necessarily occur since New Mexico does not presently have sufficient reservoir capacity to capture all of the spills. NM Exceptions at 5, 30. New Mexico asserts that it would be "neither prudent nor economically justified" to construct additional reservoir capacity to capture Conchas spills. *Id.* at 22. The record indicates, however, that since the construction and enlargement of Ute Reservoir, the NMISC has filed

numerous notices of its intention to apply for permits to appropriate and store all surface waters of the Canadian River below Ute Dam. Report at 58. Texas and Oklahoma cannot reasonably rely upon New Mexico's unsupported assertion that it will not construct or enlarge facilities to capture the spills and other waters entering the basin below Conchas Dam.

D. New Mexico's interpretation of Article IV would nullify the Compact.

New Mexico argues for an interpretation of Article IV that would allow it to impound a substantial and inestimable amount in addition to the 200,000 acre-feet that its Compact negotiator believed would be more than needed for all feasible projects below Conchas Dam. Under New Mexico's interpretation, the 200,000 acre-foot limit under Article IV(b) would be rendered essentially meaningless and the administration of the Compact would be rendered impossibly complex and controversial.

The difficulty and controversy which would plague future accounting under New Mexico's interpretation is apparent from New Mexico's treatment of the waters now impounded in Ute Reservoir. After this lawsuit was filed and Conchas Reservoir spilled, the NMISC revised its operating criteria for Ute Reservoir to provide that it would designate which of the waters spilled or released from Ute Reservoir were waters "originating above or below Conchas Dam." P. Ex. 92 at 4. New Mexico uses its arbitrary accounting practices to claim that less than eight per cent (17,000 acre-feet) of the 232,000 acre-feet impounded in Ute Reservoir on June 23, 1988, was subject to the Article IV(b) Compact limitation. Report at 111. New Mexico accomplishes this feat by designating the conservation storage pool waters as "above Conchas" waters, which it claims are exempt, and by designating the dead storage and "desilting pool" waters as "below Conchas" waters. Since the dead storage waters are admittedly exempt and New Mexico

claims that the "desilting pool" waters are also exempt, New Mexico claims a total exemption for 215,000 acre-feet out of the 232,000 acre-feet impounded on that date.

New Mexico defends its hydrologically absurd accounting on the grounds that Article IV(a) gives New Mexico free and unrestricted use of the waters originating above Conchas Dam wherever they may be located and that therefore New Mexico may freely designate the particular pool or pools in Ute Reservoir where those waters are located. Tr. of Denver Oral Arg. at 176-77. Given this position and the fact that only about 1,000 acre-feet of water have ever been diverted from Ute Reservoir, New Mexico will retain its claimed exempt "above Conchas" waters in Ute Reservoir for the foreseeable future, thereby rendering the Article IV(b) limitation essentially meaningless even in the absence of future spills.

Not only is New Mexico's accounting for "above Conchas" waters in Ute Reservoir arbitrary and self-serving, any accurate determination of the amount of such waters would have to include hydrologic assumptions and computations using data on evaporation, channel losses, reservoir contents, reservoir inflows and outflows, and diversions and return flows. Agreed Material Fact F.16.[4] Such obviously difficult accounting is the antithesis of the largely self-executing and easily verifiable Compact limitations that the negotiators intended. Report at 61.

The many assumptions and computations required to accurately determine the amount of "above Conchas" waters in Ute Reservoir would likely generate considerable disagreement among the states. Furthermore, under New Mexico's interpretation of Article IV(a), it is not only entitled to capture all spills, releases, and seepage from

[4]Although not reflected in the Agreed Material Facts submitted to the Special Master, New Mexico agreed to the materiality of this fact by its pleading dated March 27, 1989. It had previously agreed to the content of this fact.

Conchas Dam, but all other waters entering the lower basin from above Conchas Dam. This would include return flows and seepage from the Tucumcari Project, which currently are unmeasured. An accounting for these waters, even if possible, would certainly be complicated and subject to debate.

Any attempt to make an accurate accounting for the amount of "above Conchas" waters in Ute Reservoir is further complicated by the fact that the amount would be continually changing. Attempting to characterize the waters entering Ute Reservoir from all sources and leaving Ute Reservoir by spills, releases, seepage, evaporation, or diversions, even if feasible, would require continual data compilations and adjustments.

New Mexico's complaint regarding the issue of the complexity of the accounting for "above Conchas" waters is immaterial since the Report did not rely on the complexity of the accounting under New Mexico's interpretation of Article IV in construing that article. NM Exceptions at 29-30. The Special Master determined early in the proceedings that the amount of "above Conchas" water in Ute Reservoir would become material only if New Mexico's interpretation of Article IV is adopted by the Court. Tr. of Nov. 3, 1988 Meeting with Parties at 38-39. Therefore, the complexity of that accounting will not become material unless New Mexico's interpretation is adopted by this Court.

II.

The Record in This Case Establishes That New Mexico Has Breached the Canadian River Compact

Under the Report's interpretation of Article IV of the Compact, New Mexico has maintained conservation storage in excess of that permitted by the Compact. The record developed in this case, as discussed in the Report and in

Section I of this supporting brief, supports the Special Master's interpretation of Article IV as a matter of law. Although the disputed language in Article IV(a) and IV(b) is subject to different interpretations on its face, the record of the negotiating history and other relevant documents mandates the interpretation set out in the Report.

The Report did not misallocate any burden of proof or persuasion. To the extent that Texas and Oklahoma had a burden of proof or persuasion, they met that burden. New Mexico, on the other hand, did not meet its burden of proof or persuasion on its affirmative defense.

III.

Paragraphs 1, 4, and 9 of the Recommended Decree Correctly Reflect the Report and Do Not Require Modification

Paragraph 1

New Mexico's perceived problem with paragraph 1 of the Recommended Decree is illusory. It is derived from New Mexico's erroneous interpretation of Article IV. Paragraph 1 of the Recommended Decree, like Article IV(a) of the Compact, gives New Mexico free and unrestricted use of all the waters above Conchas Dam plus diversions for the Tucumcari Project. Paragraph 2, like Article IV(b), limits New Mexico's storage of water in the lower basin. When water leaves the upper basin and enters the lower basin, it originates in the lower basin. The water then becomes subject to the limitation of Article IV(b). New Mexico acknowledges that this result is the reasonable interpretation of the Recommended Decree. NM Exceptions at 40-41.

Paragraph 4

Modification of paragraph 4 of the Decree is unnecessary since, in Texas' view, the Canadian River Commission

has an implied responsibility to act reasonably in carrying out its Compact duties and functions.

Paragraph 9

New Mexico asks the Court to delete the finding in paragraph 9 that it has violated the Compact. NM Exceptions at 42-44. This request is based on a misrepresentation about the agreement of the parties and the Special Master to defer the questions of the extent of New Mexico's violations and the appropriate remedies for those violations. NM Exceptions at 42. New Mexico asserts that the issue of the extent of its violations, which was deferred, includes the determination as to whether New Mexico breached the Compact. *Id.* New Mexico cites nothing in the record to substantiate this contention.

Early in this lawsuit, the Special Master determined that the proceedings would be divided into liability and damages phases. Tr. of April 11, 1989, Meeting with Parties at 34-35. If proceedings in the liability phase established that New Mexico had breached the Compact, it was anticipated that the case would be returned to the Special Master for a determination on damages and remedies. *Id.*

New Mexico contends that even if Texas and Oklahoma prevail on the issues in this litigation, the proceedings on remand could indicate that New Mexico has not violated the Compact. Under the record in this case, including the agreed facts, should Texas and Oklahoma prevail only on the issue of "above Conchas" water, New Mexico will have breached the Compact.

New Mexico's assertion is apparently based upon the table in the Report in which the Special Master illustrates the differences between the contentions of the parties and his own determinations. Report at 111. As New Mexico points out, the Report found that on the particular date

used in the table, the extent of its violation was only 1,800 acre-feet if the desilting pool issue is remanded to the Canadian River Commission. New Mexico contends, based upon sedimentation estimates, that the amount of water that it was impounding on that date could have been overstated by some 6,000 acre-feet. Even if New Mexico's impoundment on that date was overstated, which is contrary to the agreed facts, New Mexico has, on other dates, maintained over 246,000 acre-feet in Ute Reservoir, which is more than 14,000 additional acre-feet over the amount impounded on the date used in the table. Agreed Material Fact F.14. Therefore, unless New Mexico's interpretation of the disputed "originating" language prevails, it irrefutably breached the Compact beginning in the spring of 1987.

New Mexico further objects to paragraph 9 because it can be read to find that New Mexico has been in *continuous* violation of the Compact since the spring of 1987. NM Exceptions at 43. New Mexico contends that a future sediment survey of Ute Reservoir could show that New Mexico had not been in continuous violation of the Compact since the spring of 1987. Such a survey is outside of the record and could not, in any event, establish sediment deposition for any years preceding the survey. Furthermore, if the "desilting pool" is determined to be conservation storage, as prayed for in Texas' Exceptions, New Mexico has unquestionably been in continuous violation since the spring of 1987. *See, e.g.,* Agreed Material Fact F. 11.

RESPONSE TO COMMENTS

Response to New Mexico's Comments on Procedural Requirements

Although New Mexico did not except to Section V of the Report recommending adoption of procedural requirements for future compact litigation in the Supreme Court, New Mexico did comment on those requirements in Section

IV of its Exceptions. Its comments contain a substantial misrepresentation that must be addressed.

New Mexico contends that when it refused to negotiate a legal issue, it did not breach its duty to "make a compact work," since the Special Master ultimately agreed with New Mexico's position on the legal issue. This contention is based on the erroneous assertion that the issue that precipitated this lawsuit was whether New Mexico's Article IV(b) limitation applied to water in storage or the physical capacity of reservoirs. NM Exceptions at 45. However, the primary issue in controversy within the Canadian River Commission and which resulted in this lawsuit was actually New Mexico's claim that certain waters in the enlarged Ute Reservoir were allocated for recreation and sediment control and were thereby exempt from the Article IV(b) limitation. Report at 18 - 22; *See also* Texas' Exceptions at 5. In addition, since all litigated issues in an interstate compact dispute will customarily be "won" by one side or the other, New Mexico's position would mean that no disputes need ever be negotiated.

Despite its problems with the recommended prerequisites in general, New Mexico predictably suggests that the desilting pool issue is an appropriate issue for Commission consideration and action prior to resolution by this Court. For the reasons set out in Texas' Exceptions, the desilting pool issue in this litigation is appropriate for decision by this Court at this time. Texas' Exceptions at 2-8.

New Mexico's comments regarding the procedural prerequisites illustrate the rationalizations that states will continue to use to justify lack of cooperation, regardless of Court imposed requirements. When an upstream state takes that attitude, the only recourse for the downstream state is litigation. The Court should defer consideration of adoption of the recommended prerequisites until the appropriate issue arises in a future compact dispute.

CONCLUSION

For the reasons stated above, Texas requests that New Mexico's Exceptions be overruled.

Respectfully submitted,

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